INTERIOR BOARD OF INDIAN APPEALS

Dawn Mining Co. v. Portland Area Director, Bureau of Indian Affairs

20 IBIA 50 (05/29/1991)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

DAWN MINING CO.
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-101-A Decided May 29, 1991

Appeal from termination of lease rights under two mining leases of Indian land.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Hearings--Constitutional Law: Due Process--Indians: Leases and Permits: Cancellation or Revocation

   Due process does not require that an evidentiary hearing under the Administrative Procedure Act be provided prior to cancellation of a lease of Indian land.

2. Administrative Procedure: Hearings--Board of Indian Appeals: Generally

   The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact.

3. Board of Indian Appeals: Jurisdiction

   The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to order restitution.

APPEARANCES: James A. Bieke, Esq., and Eric C. Jeffrey, Esq., Washington, D.C., for appellant; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Dawn Mining Company (Dawn or DMC) seeks review of an undated decision of the Portland Area Director, Bureau of Indian Affairs (Area

Director; BIA), terminating its lease rights under two mining leases on the Spokane Indian Reservation. The decision was received by Dawn on April 30, 1990. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Dawn is lessee under mining lease No. 14-20-0503-823 with the Spokane Indian Tribe (Tribe) and mining lease No. 14-20-0503-824 with individual Indian landowners. Both leases were approved by the Area Director on October 26, 1964, "for the sole purpose of prospecting for and mining minerals." Both authorized Dawn to prospect for and mine uranium and associated minerals. The tribal lease also authorized Dawn to prospect for and mine gold, silver, copper, lead, and tungsten. 1/

In 1976, Dawn and the Tribe renegotiated royalties under paragraph III (1) of the leases. The Area Director approved the royalty adjustment on September 9, 1976, on the condition, inter alia, that Dawn submit a mining and reclamation plan to the United States Geological Survey (USGS) within 60 days, in accordance with paragraph III (7) of the leases and 30 CFR Part 231 (1976). Dawn submitted some information to USGS in December 1976 and, in January 1980, it submitted a proposed reclamation plan. In April l980, USGS sought more information from Dawn concerning its reclamation plan, in part because of water which had been accumulating in the mine pits, but granted Dawn's plan partial approval in July 1980.

On March 2, 1981, Dawn wrote to the Tribe, stating that, because of poor market conditions, it needed to adjust its mining activities and intended to do so by mining only from one pit, Pit 3. Dawn's revision of its mining schedule, reflecting the change, was approved by USGS on July 14, 1981.

The Tribe sought reconsideration of the approval. On reconsideration, USGS withdrew its approval and ordered Dawn to stop mining from Pit 3, noting that "the exclusive extraction of ore from Pit 3, the only presently identified high-grade ore on the lease area, could seriously damage the opportunity for long-term ultimate maximum recovery of all presently identified uranium ore." Suspension Order of September 30, 1981, at 1. USGS stated that the order would remain in effect until Dawn submitted a revised mine plan which addressed five concerns. 2/ Dawn unsuccessfully challenged

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1/ Dawn began mining on the leased property in the 1950's, under leases No. 14-20-503-107, dated October 1, 1954, and No. 14-20-500-508, dated June 25, 1956. These leases were superseded by the leases at issue in this appeal. Dawn's mine is known as the Midnite Mine.

2/ Dawn was asked to respond to the following questions:

"1. What specifically prevents Dawn from returning to a mining schedule similar to [its previously approved schedule]?

"2. How does Dawn intend to ensure to the Spokane Tribe, the BIA, and the USGS that Dawn can and will mine, mill, and process all presently identified ore reserves at the Midnite mine?

the suspension order, which was upheld administratively and in Federal court. See Dawn Mining Co. v. Watt, 543 F. Supp. 841 (D.D.C. 1982), aff'd without opinion, 704 F.2d 1293 (D.C.Cir. 1983). Dawn ceased mining in November 1981 and has not resumed mining since that time.

On May 10, 1983, after affirmance of the USGS order by the court of appeals, the Bureau of Land Management (BLM) notified Dawn that it expected compliance with the order within a reasonable time. 3/ Extensive communications between, Dawn, BLM, and the Tribe ensued, concerning prerequisites to the resumption of mining and the proper management of the water accumulation problem. In September 1986, Dawn submitted a proposed mine plan. By mine order of May 19, 1987, BLM advised Dawn that more information was required for approval and set out a three-step procedure which Dawn was required to follow.

Dawn's response, dated June 10, 1987, indicated that Dawn believed it had already submitted sufficient information. It did not submit further information and did not appeal, although BLM's May 19 mine order informed it of its right to appeal.

On February 29, 1988, BLM wrote to the Area Director, recommending that BIA consider whether Dawn's leases should be cancelled. BLM stated that the leases "are not producing in paying quantities as required by lease terms and requirements at 25 CFR 211.10 and 212.12. Furthermore, there is no evidence that DMC is diligently seeking to resume mine production. This is underscored by DMC's failure to submit information as required by Items 1, 2, and 3 of BLM's Mine Order of May 19, 1987 regarding diligent resumption of mine production."

Disagreement over another issue, i.e., the appropriate amount of Dawn's performance/ reclamation bond, began on April 15, 1982, when the Spokane Agency Superintendent, BIA, ordered Dawn to increase its bond to

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fn. 2 (continued)

"3. How does Dawn intend to ensure to the Spokane Tribe, the BIA, and the USGS that Dawn will not prematurely abandon the Midnite Mine operations without adequate reclamation actions being funded and completed? How does Dawn plan on financing reclamation at the mine site? What security is offered to guarantee such financing?

"4. How does Dawn intend to ensure to the Spokane Tribe, the BIA, and the USGS that Dawn will not abandon mining operations at the Midnite Mine as soon as the presently identified high-grade ore at Pit 3 is exhausted?

"5. How does Dawn intend to ensure to the Spokane Tribe, the BIA, and the USGS that prompt and thorough explorations of the entire lease area will be carried out?"
Suspension Order at 2.

3/ BLM inherited the relevant functions of the USGS on Apr. 3, 1983, following an interim transfer to the Minerals Management Service.

$10,000,000. 4/ The bond amount was reduced to $6,682,000 by the Assistant Secretary - Indian Affairs on November 18, 1982, following Dawn's administrative appeal. The Assistant Secretary's bond order was held invalid in Dawn Mining Co. v. Clark, No. C-82-974-JLQ (E.D. Wash. Dec. 19, 1984), because of the Department's failure to provide Dawn with a meaningful opportunity to comment on the information used to set the amount of the bond. The court held, however, that the Secretary could require Dawn to post a bond prior to approval of its mining plan.

Following remand of the matter to the Department, the Assistant Secretary initiated new proceedings to determine Dawn's bond. He sought comments from Dawn and the Tribe concerning the appropriate bond amount, had a staff report prepared, and circulated the report to the parties for further comment. Ultimately, on June 18, 1987, he issued a new bond order, requiring Dawn to post a bond of $9,730,000. Dawn neither posted the bond nor challenged it in court.

On June 24, 1988, the Area Director wrote to Dawn, stating that it appeared Dawn was not producing, did not intend to resume production, and did not intend to undertake reclamation of the mine site. The Area Director gave Dawn 30 days to demonstrate that it was producing or that it intended to reclaim the mine site. During an August 10, 1988, meeting between Dawn and BIA, Dawn stated that it had applied to the State of Washington to close an off-reservation mill and that closure of the mill would generate revenue with which Dawn could resolve the problems at the mine site. By letter of October 3, 1988, the Area Director informed Dawn that, based on Dawn's representations at the meeting, no decision concerning cancellation of the leases would be made until at least January 1989. On February 3, 1989, the Area Director again wrote to Dawn, stating that Dawn had not made significant progress in meeting its obligations and requiring that Dawn submit a mine plan and reclamation bond within 45 days. Dawn responded on March 3, 1989, that it would not be able to submit a mine plan or bond within the time specified because the State of Washington was taking longer than expected to review Dawn's mill closure plan, and Dawn needed the revenues from the mill closure to obtain a bond and prepare a mine plan.

By letter of July 11, 1989, the Area Director informed Dawn that, in the Area Director's opinion, it was in violation of paragraphs I, II, and III (3), (5), (7), (9), (16), and (17) of the leases; 25 CFR 211.6, 212.10, and 216.7; and 43 CFR 3591.1, 3592.1, and 3595.1. The letter continued:

> YOU ARE FURTHER NOTIFIED that the undersigned intends to recommend that the Assistant Secretary - Indian Affairs terminate DMC's rights under this lease and demand that DMC make immediate provisions to the satisfaction of the Secretary for the conservation, repair, protection, and reclamation of the leased property

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4/ Paragraph III (9) of the leases provided for bonds in the amounts of $5,000 (tribal lease) and $10,000 (individuals' lease) but reserved to the Secretary the right to increase the bonds.

> to a condition which is not hazardous to life or limb and which is in compliance with all applicable law.

(Area Director's July 11, 1989, letter at 1). The letter next discussed the events described above and concluded

> that DMC has not acted diligently in the conduct of its mining operations, has not submitted an acceptable mine operations plan in accordance with regulatory requirements, has failed to post the ordered reclamation bond, has failed to make satisfactory provisions for the conservation, repair, protection, and reclamation of the leased property upon termination of operations, and instead is holding the property for speculative purposes.

Id. at 5. The Area Director then informed Dawn that it could request a hearing within 30 days and that it should direct its request for a hearing to the Assistant Secretary - Indian Affairs.

On August 4, 1989, Dawn wrote to the Assistant Secretary, requesting a hearing. Instead of conducting the hearing and issuing a decision himself, the Assistant Secretary remanded the matter to the Area Director "because [the Area Director] has the authority to render a decision in this matter after offering DMC an opportunity to present its case at an informal hearing." (Assistant Secretary's September 28, 1989, letter to Dawn's counsel).

The Area Director conducted an informal hearing on December 5, 1989. Counsel for Dawn, counsel for BIA, and the Tribe's chairman were present. Both prior and subsequent to the hearing, the parties were given opportunities to submit written statements. Dawn submitted comments on the merits. It also voiced procedural objections, contending that the hearing should have been conducted by an Administrative Law Judge rather than the Area Director, because the Area Director was not an impartial decisionmaker, and objecting to the fact that it was not given an opportunity to cross-examine witnesses.

In an undated decision received by Dawn on April 30, 1990, the Area Director terminated Dawn's rights under the leases and declared the rights null and void. He stated, however, that Dawn's continuing obligations under the leases were not terminated but remained in full force and effect (Area Director's decision at 7).

Concerning Dawn's procedural objections, the Area Director stated:

> DMC has objected to the Area Director acting as the first level of decision maker for the Department of the Interior on the ground that it deprives DMC of a fair hearing before an impartial decision maker. As evidence for its allegation that the Area Director is biased, it quotes from the Notice wherein DMC was informed that in the Area Director's opinion it had violated terms and conditions of the leases and regulations. The regulations, 25 C.F.R. § 211.27, require that the lessee

> be informed when such a determination has been made so that the lessee may understand the complaints against it. The regulations do not prohibit the Area Director from issuing the Notice and considering the issue in total following a hearing. Familiarity with the facts does not prevent the Area Director from making an unbiased decision.

Id. at 2. Concerning the merits, the Area Director reached the following conclusions:

> 26. The BLM Mine Order, dated May 19, 1987, is final for the Department.
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> 27. The Assistant Secretary-Indian Affairs' order dated June 8, 1987 is final for the Department.
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> 28. DMC has failed to comply with the BLM's Mine Order. Consequently, DMC has failed to comply with 43 C.F.R. § 3592.1, and provision III(7) of the leases.
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> 29. DMC has continued to occupy the Indian lands it has leased but has failed to diligently resume mining since the suspension order. Consequently, DMC has failed to comply with provisions III(3), (5) of the leases.
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> 30. DMC has failed to comply with Assistant Secretary's order to increase its reclamation bonds. Consequently, DMC has failed to comply with 25 C.F.R. §§ 211.6, 212.10, and provisions III(7) and (9) of the leases. [5/]

Id. at 5. Following a lengthy analysis, the Area Director concluded:

5/ The lease provisions held to have been violated are as follows:

"III * * * IN CONSIDERATION OF THE FOREGOING, THE LESEE AGREES:

* * * * * *

"(3) DILIGENCE, PREVENTION OF WASTE --To exercise diligence in the conduct of prospecting and mining operations, to carry on development and operations in a workmanlike manner and to the fullest possible extent; to neither commit or suffer waste to be committed upon the land leased; to comply with the applicable laws of the State in which the land is located, to take appropriate steps to preserve the property and provide for the health and welfare of workmen, to surrender and return promptly the premises upon the termination of this lease to whoever is lawfully entitled thereto, in as good condition as received, except for the ordinary wear and tear and unavoidable accidents in their proper use of the premises; not to remove any building or permanent improvement erected on the leased property during the lease. * * *

* * * * * *

Since 1981 DMC has been occupying leased Indian land without mining and without submitting the information required by BLM's May 19, 1987 Mine Order. By letter dated July 16, 1987, DMC advised BIA that it could not post the $9,730,000 reclamation bond required by the Assistant Secretary-Indian Affairs. Since that date DMC has failed to demonstrate it has prepared a reclamation plan or has actually taken action to reclaim the mine site. The essence of DMC's position is that the Department should delay terminating DMC's lease rights, thus allowing DMC to resume mining at some uncertain date, based solely on DMC's vague promise of future action by others and itself. To delay terminating DMC's lease rights under these circumstances would amount to permitting DMC to continue its rights for purposes of speculating on uncertain future events which is clearly prohibited by provision III(5) of its leases.

DECISION

Upon careful and complete consideration of the record as outlined in the Notice dated July 11, 1989, the written submissions by DMC, the Spokane Tribe, and the individual Indian land owners, and the comments made at the hearing, the undersigned hereby terminates Dawn Mining Company's lease rights under leases Nos. 14-20-0503-823 and 14-20-0503-824 and declares such rights null and void. DMC's continuing obligations under the leases are not terminated but remain in full force and effect.

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fn. 5 (continued)

"(5) DEVELOPMENT.--The land described herein shall not be held by the lessee for speculative purposes, but for mining the minerals specified. If the lessee fails to diligently develop or operate the mine, except when operation is interrupted by a strike, an act of God, or casualty not attributable to the lessee, this lease will be subject to cancellation. Whenever the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may authorize the suspension of operations for such time as he considers advisable, but this does not release the lessee from paying the advance annual rental. Payment of minimum royalty will not excuse complying with the provisions of this section.

* * * * * *

"(7) REGULATIONS.--To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases including 25 CFR [Parts 171 (1959) (tribal lease) and 172 (1959) (individuals' lease)] and 30 CFR [Part] 231 [1959]. * * *

* * * * * *

"(9) BOND.--To furnish to the Superintendent an acceptable surety bond in the amount of [$5,000 (tribal lease), $10,000 (individuals' lease)]. The right is reserved to the Secretary of the Interior or his authorized representative to increase the amount of bond above the sum named."

* * * * * *

> * * * DMC is ordered to submit to the Superintendent, within 45 days of the effective date [of this decision], its plans for the conservation, repair, and protection of the property in a condition that will not be hazardous to life or limb, as obligated by provision III (16) of the leases. [6/]

Id. at 7-8. Dawn's notice of appeal from this decision was received by the Board on May 29, 1990. Dawn and the Area Director filed briefs.

Discussion and Conclusions

On appeal, Dawn contends: (1) it was denied its right to a fair hearing before an impartial decisionmaker; (2) the Area Director erred in his conclusions concerning Dawn's mining activities; (3) the Area Director should have deferred a decision to terminate the leases until after the State of Washington acts on Dawn's mill closure plan; and (4) if the leases are terminated, Dawn is entitled to restitution for its unrecouped mine development costs. 7/

Dawn devotes the major portion of its briefs to its first argument. It contends that the Area Director could not be an impartial decisionmaker because he had prejudged the facts and the outcome of the hearing, as evidenced by his letter of July 11, 1989, in which he stated his conclusion that Dawn had violated the leases and regulations. Dawn further contends

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6/ Provision III (16) provides in relevant part: "On termination of operations under this lease, the lessee shall make provisions for the conservation, repair, and protection of the property and leave all of the areas on which the lessee has worked in a condition that will not be hazardous to life or limb, and will be to the satisfaction of the Superintendent."

7/ Dawn raises as a threshold matter a question concerning the "meaning" of the Area Director's decision, noting that the Area Director terminated Dawn's "lease rights" and declared them null and void, but specified that Dawn's "continuing obligations under the leases are not terminated but remain in full force and effect." Dawn contends that the Area Director had no authority to declare "lease rights" null and void without declaring the leases void. Dawn apparently recognizes, however, that it has continuing obligations under provision III (16) of the leases (Dawn's opening brief at 10-11). The Area Director responds that he "used the words 'lease rights' to make clear that his decision, if ultimately upheld, would not be understood by Dawn as an admission by the Area Director or the Department that Dawn no longer had any obligation to perform certain actions at the mine site" (Area Director's brief 3).

Despite the perhaps unusual language of the Area Director's decision, its meaning is clear. The meaning of provision III (16) of the leases is also clear, imposing obligations on Dawn following termination of operations.

that the procedure followed by the Area Director violated the Administrative Procedure Act (APA), 5 U.S.C. § 554 (1988); 8/ 25 CFR 211.27(a); and Dawn's right to due process.

The Board first considers whether the lease termination proceeding in this case was subject to the formal hearing requirements of the APA, as Dawn contends it was. 5 U.S.C. § 554 provides in relevant part:

> (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *.
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> * * * * * *
>
> (d) * * * An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

Dawn alleges that the Area Director violated subsection 554(d). It must first be determined, however, whether, by virtue of subsection 554(a), this section is applicable here.

Dawn has not identified a statute that requires a formal APA hearing in this case. The statutes governing Dawn's leases are the Act of March 3, 1909, as amended, 25 U.S.C. § 396 (leases of allotted land for mining purposes), and the Act of May 11, 1938, as amended, 25 U.S.C. §§ 396a-396g (leases of tribal land for mining purposes). Neither statute sets out procedures for termination or cancellation of leases, and neither requires adjudications "on the record after opportunity for an agency hearing." Both statutes authorize the Secretary to promulgate rules and regulations. 25 U.S.C. §§ 396, 396d. Under this authority, BIA has promulgated regulations providing for, inter alia, cancellation of leases. 25 CFR 211.27(a), concerning leases of tribal land, provides:

> When, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

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8/ All further references to the United States Code are to the 1988 edition.

The corresponding provision of the regulations concerning leases of allotted land does not require a hearing but provides in relevant part: "A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated." 25 CFR 212.23(a).

Dawn argues that the hearing requirement in 25 CFR 211.27(a) supports its contention that the formal hearing requirements of the APA are applicable to this case. The Board rejects this contention because (1) the regulatory requirement is not a statutory requirement and (2) the regulation does not, by reference to the APA or otherwise, require that formal hearing procedures be followed. Even where a statute requires a hearing, in language as general as that in section 211.27(a), a formal APA hearing is not necessarily required. See Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1482 (D.C. Cir 1989) ("[I]t is not our office to presume that a statutory reference to a 'hearing', without more specific guidance from Congress, evinces an intention to require formal adjudicatory procedures * * * We will henceforth make no presumption that a statutory 'hearing' requirement does or does not compel the agency to undertake a formal hearing 'on the record.'") The Board concludes that no statute or regulation makes 5 U.S.C. § 554 applicable to the termination of Dawn's lease.

Dawn contends, however, that an APA hearing was mandated by the Constitution under Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), in which the Supreme Court held that the APA is applicable to deportation proceedings. The Court had held in earlier cases that the Constitution required hearings in deportation cases. In Wong Yang Sung, it held that, where an evidentiary hearing is required by the Constitution, it must be conducted in accordance with the APA. Thus, a necessary predicate to appellant's argument that Wong Yang Sung is applicable here is a conclusion that a hearing in Dawn's case is constitutionally required.

The Supreme Court has made it clear that due process does not require evidentiary hearings in all cases where deprivation of property rights is a possibility. In Matthews v. Eldridge 424 U.S. 319, 348-49 (1976), the Court stated:

> The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." * * * All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard." [Citations omitted.]

Summarizing its earlier decisions on the subject, the Court stated that those decisions

> indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

With respect to the first factor described in Eldridge it is apparent, as the Area Director concedes, that the private interest in this case is significant--Dawn is subject to the loss of its lease rights.

With respect to the second factor, however, it is not readily apparent that the risk of error in the termination decision would have been reduced by an evidentiary hearing prior to the decision. The Area Director provided substantial procedural safeguards against the possibility of error. He gave Dawn notice, in his letter of July 11, 1989, of the basis for his belief that Dawn had violated its leases. He provided Dawn at that time with a list of documents upon which he relied in forming his opinion, as well as copies of the documents which Dawn did not already have. He held an informal hearing, at which Dawn had the opportunity to present its arguments orally, and gave Dawn the opportunity to submit written comments both before and after the informal hearing.

The Supreme Court noted in Eldridge that evidentiary hearings are more important in cases where witness credibility and veracity are factors or where the issues cannot be well addressed in writing, such as where the affected person lacks the ability to communicate effectively in writing. However, in cases where the issues are sharply focused or where decisions are based on professional reports, "[t]he potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less." 424 U.S. at 344-45. Further, where the affected person has access to information relied upon by the agency in the decisionmaking process, "enabling [him] to 'mold' his argument to respond to the precise issues which the decisionmaker regards as crucial," Id. at 346, the risk of error is reduced, and an evidentiary hearing is less important.

The instant case is one where the issues are sharply focused and where Dawn is entirely capable of presenting its position in writing, as it has amply demonstrated in the filings it made with the Area Director, as well as those it has made with this Board. Further, as noted above, Dawn had access both to the documents relied upon by the Area Director and to the Area Director's analysis of the matter, enabling it to direct its arguments precisely to the issues identified by the Area Director. All of these factors indicate that the risk of error was minimal, even in the absence of an evidentiary hearing.

Dawn contends, however, that the Area Director should have been disqualified as the decisionmaker because he had prejudged the case and had improperly intermingled investigative and adjudicative functions. In essence, as relevant to the second Eldridge factor, Dawn is contending that the risk of error was increased by the Area Director's prior involvement in the matter.

In Withrow v. Larkin, 421 U.S. 35, 52, 58 (1975), the Supreme Court stated that its cases "offer no support for the bald proposition * * * that agency members who participate in an investigation are disqualified from adjudicating" and, further, that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation." The fact that an individual has expressed an opinion based on his investigation does not preclude him from later adjudicating the matter. Id. at 48. The court also noted that there is a "presumption of honesty and integrity in those serving as adjudicators." Id. at 47. Even given these general principles, however, an individual may be precluded from acting as both investigator and adjudicator in a case where "the risk of unfairness is untolerably high." Id. at 58.

25 CFR 211.27(a) contemplates that the same BIA official who gives notice of a lease violation, "specifying the terms and conditions violated," may later serve as decisionmaker concerning cancellation of the lease. In this case, the Area Director issued a particularly detailed notice letter. However, even a detailed expression of opinion, in itself, does not disqualify the Area Director as decisionmaker under the Supreme Court's analysis in Withrow. In fact, the Assistant Secretary's remand to the Area Director made the Area Director's situation somewhat analogous to one discussed in Withrow, i.e., that of a judge or hearing examiner who rehears a case on remand after being reversed by a higher forum. The court observed that there was no prohibition against such adjudicators hearing the same case more than once, even though they had expressed a strong opinion in the first hearing. 9/

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9/ The Court stated:

"This Court has also ruled that a hearing examiner who has recommended findings of fact after rejecting certain evidence as not being probative was not disqualified to preside at further hearings that were required when reviewing courts held that the evidence had been erroneously excluded. NLRB v. Donnelly Garment Co., 330 U.S. 219, 236-237 (1947). The Court of Appeals had decided that the examiner should not again sit because it would be unfair to require the parties to try 'issues of fact to those who may have prejudged them . . .' 151 F. 2d 854, 870 (CA8 1945). But this Court unanimously reversed, saying:

"Certainly it is not the rule of judicial administration that, statutory requirements apart . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.'
330 U.S. at 236-37."
421 U.S. at 49.

As discussed above, Dawn was given ample opportunity to refute the Area Director's opinion and, because of the Area Director's thorough discussion in his notice letter, benefitted from a unique opportunity to mold its argument to the Area Director's concerns. Dawn has not shown, and nothing in the record indicates, that the Area Director had any bias against Dawn. Rather, the record shows that the Area Director was meticulous in providing Dawn with procedural safeguards and that he reached his decision after careful analysis of the facts. Finally, the fact that the decision was made by the Area Director rather than the Assistant Secretary provided Dawn with the additional procedural safeguard of review by an appellate body independent from both the BIA and the Assistant Secretary - Indian Affairs. 10/ Dawn has not shown that the "risk of unfairness" in the Area Director's serving as decisionmaker was "untolerably high" or that there was any other reason why the Area Director should have been disqualified from rendering the initial administrative decision in this case.

The third factor to be considered under Eldridge is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." The Supreme Court also termed this interest the "public interest," 424 U.S. at 347, and noted: "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." Id. at 348. If the constitution entitled Dawn to an evidentiary hearing prior to the Area Director's decision, it must also entitle all lessees of Indian land to such a hearing in the event their leases are proposed to be cancelled. Further, the same right would apparently also accrue to lessees and others with interests in public lands of the United States. 11/ Providing such hearings would clearly be a fiscal and administrative burden on the Department of the Interior.

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10/ Under 25 CFR Part 2, decisions of the Assistant Secretary are final for the Department, while Area Directors' decisions may be appealed to this Board.

As was stated in the preamble to the present version of the Board's procedural regulations, 54 FR 6483, 6484 (Feb. 10, 1989):

"The Office of Hearings and Appeals was created as a separate office within the office of the Secretary of the Interior in 1970 to provide independent objective administrative review of decisions issued by the Department's various program Bureaus and Offices. In promulgating the initial regulations providing for review of administrative decisions of the Bureau of Indian Affairs, the Department stated: 'Exercise of the Secretary's review authority by the Board of Indian Appeals will ensure impartial review free from organizational conflict in that the Board is part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs.' 40 FR 20819 (May 13, 1975)."

11/ Both this Board and the Interior Board of Land Appeals have held that not all those who claim deprivation of property rights are entitled to an

Further, where the cancellation of Indian leases is concerned, there is another aspect to the Government or public interest factor of the Eldridge equation, beyond the general fiscal and administrative concerns. That is the trust responsibility of the United States for the management of Indian property. The trust responsibility requires BIA to act in the best interest of the Indian landowners. See, e.g., Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 94 I.D. 353 (1987), aff'd sub nom. Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103 (D.D.C. 1990), aff'd, 925 F.2d 490 (D.C.Cir. 1991). The delays resulting from a requirement for evidentiary hearings prior to lease cancellation, in addition to the existing regulatory procedures, could well constitute a burden upon the trust responsibility.

[1] Employing the Eldridge analysis, the Board concludes that, even given Dawn's interest here, the evidentiary hearing Dawn seeks does not promise an appreciable lowering of the risk of error and therefore does not justify the significant cost to the Government and the potential burden on the trust responsibility that would result from a ruling that evidentiary hearings are required prior to the cancellation of Indian leases. Cf. Chemical Waste Management, Inc. v. EPA, 873 F.2d at 1485. The Board holds that Dawn did not have a constitutional right to an evidentiary hearing prior to termination of its lease rights. Accordingly, inasmuch as neither the constitution nor any statute required an adjudication "on the record after opportunity for an agency hearing," the Board further holds that 5 U.S.C. § 554 is inapplicable here.

[2] In connection with its argument that it was entitled to a formal APA hearing prior to termination of its lease rights, Dawn proposes that the alleged error be cured by a Board referral of this matter to an Administrative Law Judge under 43 CFR 4.337 (a), which provides that, "where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing." Although the Board has found that Dawn was not entitled to a formal hearing prior to termination, it treats this aspect of Dawn's argument as a request that the Board order a hearing under Board procedures.

Dawn lists five issues, which it contends are disputed factual or "fact-based" issues:

> (1) whether Dawn's actions regarding the mine plan and increased bond were reasonable in the circumstances; (2) whether Dawn failed to act diligently to resume mining; (3) whether Dawn has conducted

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fn. 11 (continued)
evidentiary hearing prior to administrative action. Rather, the Boards have held that the claimants' due process rights are protected under the administrative review process, which includes a right of appeal to an independent Board. See, e.g., Mobil Oil . v. Albuquerque Area Director, 18 IBIA 315, 331-32, 97 I.D. 215, 223-24 (1990); Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 194, 90 I.D. 243, 248 (1983); Santa Fe Pacific Railroad Co., 90 IBLA 200, 219-20 (1986); H. B. Webb, 34 IBLA 362, 371-72 (1978).

> actual reclamation activities; (4) whether Dawn was holding the property for speculative purposes; and (5) whether it was reasonable and appropriate to defer decision on lease termination pending a decision by the State of Washington * * * on Dawn's mill closure plan (which, if approved, promises to generate sufficient funds to enable Dawn to meet the agencies' demands). While these issues were not directly addressed in the Area Director's specific findings of underlying fact, they involved critical fact-based determinations in which the Area Director rejected Dawn's position and on which he relied in reaching his ultimate decision to terminate the Leases.

(Dawn's reply brief at 3-4). See also Dawn's opening brief at 12. Dawn indicates that it seeks an evidentiary hearing on these issues.

It is clear that Dawn does not actually dispute the findings of facts on which the Area Director's decision is premised but, rather, some of the conclusions the Area Director drew from those facts. Significantly, Dawn does not challenge the Area Director's statements that it failed to comply with the May 19, 1987, BLM mine order and failed to increase its reclamation bond as required by the Assistant Secretary's June 18, 1987, order. It does not even contest the Area Director's conclusions that those failures on Dawn's part constituted violations of the leases and regulations. Further, even though Dawn challenges the Area Director's conclusion that it did not diligently resume mining, it does not contest the underlying facts recited by the Area Director, upon which he relied to reach his conclusion. Rather, Dawn evidently concedes that it acted as the Area Director stated but argues only that its actions were reasonable.

Whether or not Dawn's actions were reasonable is not a question justifying referral of this case for an evidentiary hearing, particularly in light of the exhaustive nature of the written record. The Board finds that Dawn has not raised any genuine issues of material fact for which the Board should order an evidentiary hearing. Cf. Star Lake Railroad Co. v. Lujan, 737 F. Supp. at 110 ("No evidentiary hearing is required when there is no issue of material fact in dispute."). Accordingly, Dawn's request for a hearing is denied.

As noted, Dawn does not contest the Area Director's conclusions that it was in violation of the leases and regulations by failing to comply with the BLM mine order and the Assistant Secretary's bond order. These violations, without more, justify the termination of Dawn's lease rights.

Dawn does contest the Area Director's conclusion that Dawn "has continued to occupy the Indian lands it has leased but has failed to diligently resume mining since the [September 30, 1981] suspension order." Dawn contends that it has been diligent in attempting to resume mining and that its actions have been reasonable under the circumstances.

The record in this appeal refutes Dawn's contention. It is clear from the record that Dawn, rather than taking the actions necessary to

resume mining, continually produced excuses for not doing so. It is also clear that both BIA and BLM offered Dawn repeated opportunities to cure its violations, in some cases over the objections of the Tribe, during protracted attempts to reactivate mining and ameliorate environmental concerns.

The Board finds that the Area Director reasonably concluded that Dawn failed to diligently resume mining after the 1981 suspension order.

Dawn also argues that the Area Director should have deferred a decision to terminate the leases until after the State of Washington acts on Dawn's mill closure plan. Dawn made this argument before the Area Director, contending that proceeds from the mill closure, if approved, would generate revenue sufficient to enable Dawn to meet its obligations at the mine. The Area Director found that Dawn's statements concerning this matter were unclear and inconsistent and that Dawn could not guarantee either that its plan would be approved or that the mill closure, if approved, would generate sufficient income to finance its obligations at the mine.

The Board finds that, given the uncertainty as to whether the completion of state proceedings would in fact result in a resumption of mining by Dawn, it was entirely reasonable for the Area Director to decline to await completion of the state proceedings.

[3] Dawn's final argument is that, if its leases are terminated, it is entitled to restitution from the Tribe and the individual Indian landowners for its recouped mine development costs.

The Board is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to order restitution. Accordingly, the Board lacks jurisdiction over this aspect of Dawn's appeal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Portland Area Director's decision terminating Dawn's lease rights is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge